NO. 48408-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARYL HARDING,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove each element of assault in the second degree assault beyond a reasonable doubt as alleged in count 1 and count 2 of the information, depriving appellant Daryl Harding of his Fourteenth Amendment right to due process.

2. The trial court erred in instructing the jury regarding the "first-aggressor" exception to self-defense.

3. Error is assigned to Jury Instruction No. 12 which reads, no person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

4. The trial court erred when it denied the appellant's request for a lesser included offense instruction for fourth degree assault.

5. The State failed to establish that a two by four piece of wood, three feet in length with nails driven through it, as used, was a "deadly weapon."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. Mr. Harding was charged with two counts of second degree assault for allegedly committing an assault with a deadly weapon against two persons. The alleged deadly weapon was a wood two by four—three feet in length—with nails pounded through it. To convict Mr. Harding of second degree assault, the State had to prove he inflicted substantial bodily injury on Greg Stark and Norm Jensen. Did the state present sufficient evidence to convict Mr. Harding of second degree assault where the State failed to disprove beyond a reasonable doubt Mr. Harding's affirmative defense of self-defense? (Assignment of Error 1).

2. Did the trial court err in giving a "first aggressor" jury instruction? (Assignments of Error 2 and 3).

3. Was Mr. Harding entitled to a lesser included offense instruction for fourth degree assault when the jury could have found that although the appellant hit Mr. Stark and Mr. Jensen with piece of wood, the two by four was not a deadly weapon and therefore Mr. Harding was not guilty of second degree assault? (Assignment of Error 4).

4. Was the two by four used as a deadly weapon under the

facts and circumstances of this case? (Assignment of Error 5).

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Greg Stark lives in an apartment in Kelso, Cowlitz County Washington. 2Report of Proceedings (RP) at 112.[1] Mr. Stark's apartment is located in a four-plex building which is configured with two apartments on the ground floor and two apartments—designated as apartments 3 and 4—on the second story. 2RP at 112. A balcony joins the two second story apartments, and plastic chairs were arranged on the balcony outside each apartment.

For several days Mr. Stark noticed that Daryl Harding frequently was sitting in the chair outside apartment 4 or the chair outside apartment 3 when Mr. Stark left or returned to his apartment, which was apartment 3. As he passed, Mr. Harding would ask Mr. Stark for hand rolled cigarettes from Mr. Stark. After three days of seeing him in front of the apartment, Mr. Stark, who was with his girlfriend, walked out of his apartment and again saw Mr. Harding sitting in the chair in front of his apartment. 2RP at 70. As he and his girlfriend left the evening of July 8, 2015, Mr. Harding again asked him for a cigarette. Mr. Stark said "no," that he had

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[1]The Verbatim Report of Proceedings consists of three volumes, designated as follows: 1RP-(7/10/15), (7/13/15), (7/14/15), (7/15/15), (7/16/15), (7/21/15), (7/23/15), (8/11/15), (8/13/15), (8/25/15), (9/15/15), (10/15/15), (11/2/15), (12/1/15)(sentencing); 2RP-(10/22/15)(jury trial, day one); and 3RP-(10/23/15)(jury trial, day two).

given him too many cigarettes already and that he could not afford to give away cigarettes. 2RP at 71, 83. He stated that Mr. Harding then reached into his sock and pulled out a $10.00 bill. 2RP at 71. Mr. Stark told him that there was a store was located a block away and that he needed to go buy cigarettes for himself. 2RP at 71. Mr. Stark also told Mr. Harding not to sit in front of his apartment and that he was making Mr. Stark's girlfriend nervous by constantly being outside in the chairs on the balcony. 2RP at 71.

Later than night Norm Jensen---a friend of Mr. Stark's--was visiting Mr. Stark's apartment. 2RP at 72. The two men left to walk to a local convenience store to buy beer. 2RP at 72-73. They bought a six pack of 16 once beer in cans. 2RP at 73. When they returned, Mr. Harding was again sitting in the chair in front of Apartment 4. Mr. Stark testified that when he walked past, Mr. Harding called him a derogatory ethnic slur. 2RP at 73. A downstairs neighbor, who was of Native American heritage, heard Mr. Harding and came upstairs. 2RP at 74. Mr. Stark told Mr. Harding that he needed to get off the balcony, that he had been camping there for three days and he did not belong there. 2RP at 74. Mr. Harding continued to argue with him, and Mr. Stark and Mr. Jensen went inside the apartment. The apartment door remained open and Mr. Harding continued

to yell, so Mr. Stark closed the door. 2RP at 75. The yelling continued, and after Mr. Stark called the police, Mr. Harding left the balcony. 2RP at 76.

When the police arrived, they located Mr. Harding sitting in the chair in front of Apartment 4. 2RP at 115. He told the police that he was transient and had been staying in front of Apartment 4, which was vacant, and that he did not know anyone in the apartment complex. 2RP at 115. He stated that he intended to sleep on the balcony of the apartment that night but that he would leave if the police told him to do so. 2RP at 115. Kelso police officer John Johnston, who had been dispatched to the apartment, stated that he and another officer escorted Mr. Harding down the stairs and away from the complex. 2RP at 115. Officer Johnston stated that as they walked him out of the apartment building, Mr. Harding complained that "tweakers" had stolen his guitar and amplifier. 2RP at 115. Officer Johnston stated that he attempted to take a report from him about his missing musical equipment, but that Mr. Harding became angry and then said to "forget it" and that the police would not do anything about the theft. 2RP at 116.

After Mr. Harding left the balcony, Mr. Stark and Mr. Jensen remained in the apartment drinking beer until Mr. Jensen received texts

from his girlfriend to go home. 2RP at 85. Mr. Jensen left the apartment first and as he did, he testified that he was hit with a large piece of wood with a nail in it. 2RP at 78. Mr. Stark went outside and tried to grab the stick and his hand was hit by the nail when he tried to block it, and when he pulled away, a nail in the stick cut his hand. 2RP at 81. Mr. Stark was also hit on the forearm when he raised his arms while being hit. 2RP at 79.

After he went outside his apartment and Mr. Jensen was being hit, Mr. Stark pushed Mr. Jensen back into the apartment and closed and locked the sliding glass door. 2RP at 80. He stated that after he closed the door, Mr. Harding beat on the sliding glass door with the stick. 2RP at 80.

Mr. Jensen testified that he opened the sliding glass door to leave and as he walked out he saw something come at him and he raised his hand to protect himself. 2RP at 99. As he did, he was hit on the hand with a stick with nails in it. 2RP at 99. He turned to see what was happening and was hit on the shoulder with the board. 2RP at 100. At that point Mr. Stark came out of the apartment and spun him around, and as he did, Mr. Harding hit him in the stomach with the board. 2RP at 100. Mr. Stark then pushed Mr. Jensen back inside the apartment. 2RP at 100. Inside the apartment, Mr. Stark called the police. RP at101. Mr. Jensen testified that

a nail from the board hit his finger and he sustained a mark on his shoulder as a result of the incident. 2RP at 102-03.

Officer Johnston was dispatched a second time to the apartment, and as he approached the apartment, he saw Mr. Harding sitting in the same white plastic chair outside Apartment 4. 2RP at 118. Officer Johnston stated Mr. Harding stood up as he approached, put his hands behind his back and requested that he be arrested and said that he "got his point across." 2RP at 118.

When he contacted Mr. Stark and Mr. Jensen in the apartment, he saw that Mr. Jensen had a swollen knuckle and blood coming from his hand from cuts on his fingers and that he stated that his shoulder hurt. 2RP at 119. Mr. Stark had bruising on his forearm. 2RP at 120. They stated that they had been hit by a two by four board. Police found a two by four, approximately three feet in length with nails driven through it, propped against the chair in which Mr. Harding was sitting when they arrived. 2RP at 121.

Mr. Harding stated that the three men were arguing with him and using racial slurs, and that the downstairs neighbor went back to his apartment and had previously told Mr. Harding that he had "somethin' for [him.]" 2RP at 165. Mr. Harding testified that he was afraid of being

stabbed or thrown off the balcony and grabbed a two by four from the stairwell. 2RP at 165. He stated that all three men then tried to rush him and that he hit the biggest one first, and then hit the second man with the stick. 2RP at 166. He stated that the third man ran. 2RP at 167. He stated the he was afraid of being beaten to death or thrown from the balcony, which is why he used the two by four to hit them as they advanced. 2RP at 167.

Mr. Harding was charged by the Cowlitz County Prosecutor's Office with two counts of assault in the second degree. The State alleged also alleged that Mr. Harding was armed with "a deadly weapon, a spiked stick" at the time of the assault. Clerk's Papers (CP) 4-5; RCW 9A.36.021(1)(c); Appendix A.

The matter came on for jury trial on October 22 and 23, 2015, the Honorable Marilyn Haan presiding. 2RP at 4-184, 3RP at 3-81.

Mr. Harding's counsel proposed and argued in favor of a lesser included offense instruction for fourth degree assault. 3RP at 19; CP 49-70. Defense counsel argued that whether the two by four was a deadly weapon was a disputed issue:

> I think they should be included because the jury may find that the stick is not a deadly weapon, and if they find the stick is not a deadly weapon then it would flow—we would suggest that they should be able to contemplate whether or not it was a

fourth degree.

2RP at 20-21.

The trial court denied the requested instruction. 3RP at 29.

The jury found Mr. Harding guilty of second degree assault as charged in both counts, and found by special verdict that he was armed with a deadly weapon at the time of the offenses. 3RP at 76; CP 101, 102.

The court imposed a standard range sentence of 43 months and an additional 24 months based on the deadly weapon enhancements. 1RP (12/1/15) at 9.

Timely notice of appeal was filed December 4, 2015. CP 108.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. HARDING OF ASSAULT IN THE SECOND DEGREE IN COUNTS 1 AND 2

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it

permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Self-defense is an affirmative defense to a charge of assault. See *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984):

> Self-defense is defined by statute as a lawful act. See RCW 9A.16.020(3). It is therefore impossible for one who acts in self-defense to be aware of facts or circumstances "described by a statute defining an offense". RCW 9A.08.010(1)(b)(i). This is just another way of stating that proof of self-defense negates the knowledge element of second degree assault

The use of force is lawful when used by a person about to be injured. RCW 9A.16.020(3). A person's right to use force is dependent upon what a reasonably cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm; actual danger need not be present. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980). Whether an individual acted in self-defense is typically a question for the trier of fact. See *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742, review denied, 92 Wn.2d 1038 (1979).

When a defendant makes a claim of self-defense, he or she must set forth sufficient facts to establish the possibility of self-defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Robbins*, 138 Wn.2d 486, 495, 980 P.2d 725 (1999), See *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) ("To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.")

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required: "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

a. **The prosecutor failed to meet his burden of disproving self-defense beyond a reasonable doubt.**

In this case, Mr. Harding presented sufficient evidence to establish that he acted in self-defense. Mr. Harding testified that during the confrontation with Mr. Stark and Mr. Jensen, they were using racial terms, and that he verbally "got racial back," and that a downstairs

neighbor then came to the top of the stairs and threated to kill him. 2RP at 162-63. The testimony established that during the confrontation, the downstairs neighbor told Mr. Harding "I got somethin' for you" and then ran downstairs to his apartment, and at that point Mr. Harding looked for a weapon and found the piece of wood on the stairway. 2RP at 165. The neighbor returned and Mr. Jensen and Mr. Stark then "came out like two defensive linemen getting ready to rush a quarterback," and he testified that if he did not have the piece of wood, they would have beaten him. 2RP at 166. Mr. Harding stated that he was in fear of being thrown from the second story balcony and was also afraid of being beaten and afraid that the neighbor was going to stab him. 2RP at 166. Mr. Harding testified that Mr. Jensen, ("the biggest one") tried to rush him and that he hit him in the head and then hit him a second time, and then hit the second man, and after "he went down," the third man fled. 2RP at 166-67.

These facts are sufficient to cause a "reasonably cautious and prudent person in similar circumstances" to "reasonably believe he was in danger of bodily harm."

Moreover, as discussed below, the facts of this case do not establish that Mr. Harding was the first aggressor. The parties were engaged in an argument and were using racial terms against each other.

He stated that Mr. Jensen and Mr. Stark, who had been drinking 16 ounce beers, were intoxicated. After the neighbor came upstairs and then intimated that he was going to retrieve a weapon and threatened to kill him, Mr. Harding became afraid of being stabbed, or seriously hurt or killed by being thrown off the second story balcony by the three men. When the men advanced on him, Mr. Harding's use of the two by four was justified in light of his fear of personal injury.

Since Mr. Harding's defense at trial was self-defense, and since Mr. Harding produced evidence to support his claim of self-defense, the burden shifted to the prosecution to prove the absence of self-defense beyond a reasonable doubt.

The prosecutor argued that Mr. Harding was the aggressor because he had been told to leave the building by the police, yet he returned to Mr. Stark's residence after the argument. 3RP at 64. At best, this evidence merely raises a colorable argument that it is possible that Mr. Harding failed to present sufficient evidence to establish beyond a reasonable doubt that he did not act in self-defense. However, the state's argument overlooks the fact that Mr. Harding did not flee after the incident, nor did he attempt to hide the two by four. Instead, he remained at the scene, which supports his claim of self-defense. Since self-defense

is an affirmative defense to the charge of assault, and since the State failed to prove beyond a reasonable doubt that Mr. Harding did not act in self-defense, this court must vacate Mr. Harding's convictions in both counts and dismiss this case.

2. THE STATE FAILED TO PROVE THAT THE TWO BY FOUR USED BY MR. HARDING CONSTITUTED A DEADLY WEAPON UNDER THE CIRCUMSTANCES IN WHICH IT WAS USED.

a. The State had to prove that the two by four was a "deadly weapon," an essential element of second-degree assault

As noted in Section 1 of this brief, for a criminal conviction to be upheld, the State must prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Walton*, 64 Wn. App. 410, 415, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). But, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven

beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

b. The State did not prove the board was a "deadly weapon," because the State did not prove that under the circumstances in which it was used, it was readily capable of causing death or substantial bodily harm.

RCW 9A.36.021 provides:

"A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree. . . (c) assaults another with a deadly weapon."

RCW 9A.36.021(1)(c).

As defined by statute,

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance. . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

This definitional statute creates two categories of deadly weapons. Where an item is not per se a deadly weapon, whether it qualifies under the statute depends on if, under the circumstances in

which it is used, it is readily capable of causing death or substantial bodily harm. *State v. Carlson*, 65 Wn. App. 153, 158- 59, 828 P.2d 30, rev. denied, 119 Wn.2d 1022 (1992). In *Carlson*, the Court reasoned that the Legislature intended to reserve to the serious category of second-degree assaults weapons that are "actually readily capable of producing bodily harm, reserving the 'apparently capable" situations for gross misdemeanor status." *Carlson*, 65 Wn. App. at 160 (emphasis omitted).

"Circumstances" include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." *State v. Shilling*, 77 Wn. App. 166, 172, 889 P.2d 948, rev. denied, 127 Wn.2d 1006 (1995) (citations omitted). "Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm." *Id.*

"Substantial bodily harm" is defined by statute as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Unless a weapon falls within the narrow scope of the deadly weapons per se, its status rests on the manner in which it is used,

attempted to be used, or threatened to be used.

For instance, in *State v. Skenandore*, 99 Wn. App. 494, 994 P.2d 291 (2000) *Skenandore* was convicted of second assault for assaulting a corrections officer with a spear made out of rolled up writing paper bound with dental floss and affixed to a golf pencil. When the officer was passing his breakfast through a port in the cell door, Skenandore struck him in the chest with the spear. He then disassembled it and flushed parts down the toilet. *Skenandore,* 99 Wn. App. at 496-97. The prosecutor argued that a sharpened pencil in the eye could have caused substantial bodily damage, and the jury convicted Skenandore of assault with a deadly weapon. *Id.* at 498. This Court reversed, holding that the evidence was insufficient to establish the deadly weapon element of second degree assault, because under the circumstances in which it was used, the spear was not readily capable of causing death or substantial bodily harm. Id. at 501. The Court noted that the circumstances to consider include "'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" Id. at 499 (quoting *State v. Shilling*, 77 Wn. App. 166, 171-72, 889 P.2d 948, review denied, 127 Wn.2d 1006 (1995)). This Court found that while the homemade spear might under some circumstances constitute a deadly

weapon, the circumstances in that case did not support such a finding. There was no testimony regarding the spear's potential for causing substantial harm to the eye or face, and the jury was not able to the spear to determine its potential because Skenandore had disassembled it and it was not in evidence. *Skenandore,* 99 Wn. App. at 500. Moreover, there was no evidence that the spear could have come into contact with the officer's eye, given the location of the port in the cell door separating Skenandore and the officer in relation to where the officer was standing. *Id.* Thus, "the surrounding circumstances inhibited the spear's otherwise potential, but unproven, ready capability to inflict substantial bodily harm." *Id.*

Here, even considering the evidence in the light most favorable to the State, however, the evidence fails to establish that the two by four, in the manner in which it was used, constituted a deadly weapon. While a two by four might under some circumstances constitute a deadly weapon, the evidence does not demonstrate that the piece of wood as used was readily capable of causing substantial bodily harm. First, the evidence showed that Mr. Jensen was hit on the finger causing a cut, and was also hit on the shoulder, which left bruising. Mr. Stark was hit on his forearm. There was no evidence, however that the board hit either man on the head

or near their eyes. While a blow from a two by four to the face might cause fracturing or damage to the eye socket, Mr. Harding did not strike either man in the face. Cf., *Shilling*, 77 Wn. App. at 172 (expert testimony established a blow using the glass could fracture the nose and/or cause lacerations requiring stitches and producing permanent scarring). Instead, the board appears to have been used exactly as Mr. Harding described it: as a defensive weapon used to stop Mr. Stark and Mr. Jensen from hurting or killing him. The board does not appear to have been selected because of the nails in it, but only because it was the only available object on the stairs where Mr. Harding was confronted by the three men. Moreover, the evidence does not indicate that Mr. Harding purposely intended to inflict substantial bodily harm. There is no testimony that he selected the board because of the nails or that he was even aware that there were nails in the board.

Consideration of the statutorily-provided factors defining a deadly weapon indicates a rational finder of fact could not find that the board was a deadly weapon. The remedy is reversal and dismissal of the conviction.

3. MR. HARDING WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION FOR FOURTH DEGREE ASSAULT.

Mr. Harding's asserted self-defense at trial; he testified that Mr. Stark,

Mr. Jensen, while drinking, engaged in a racially fueled argument, and a downstairs neighbor, who left and then returned after broadly implying that he had retrieved a weapon from his apartment, physically advanced on Mr. Harding, who had armed himself with the two by four with nails in it. The facts presented in the case could allow a jury to find the board that Mr. Harding used to hit them was not a deadly weapon. Accordingly, defense counsel requested a lesser included offense instruction for fourth degree assault. CP 20-23. The trial court refused to give the requested instructions. 3RP at 29. The court's ruling constitutes error that requires reversal of the conviction.

a. Standard of review

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998).

The Washington Supreme Court has defined judicial discretion as, a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result. *MacKay v. MacKay*, 55 Wn.2d 344, 348, 347 P.2d 1062 (1959), citing, State ex rel. *Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956). "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on

a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Sleasman v. City of Lacey*, 128 Wn.App. 617, 13, 116 P.3d 446 (2005).

b. The trial court abused its discretion in failing to instruct the jury on assault in the fourth degree

Trial counsel argued that the court should instruct the jury on the lesser included offense of fourth degree assault:

> [t]he jury may find that the stick is not a deadly weapon, and if they find the stick is not a deadly weapon then it would flow—we would suggest that they should be able to contemplate whether or not it was a fourth degree [assault.]
>
> 3RP at 20-21.

After hearing extensive argument regarding the use of WPIC 4.11 pertaining to lesser include crimes and lesser degree crimes, the trial court denied defense counsel's request that the jury be instructed on fourth degree assault. 3RP at 25-26, 29

c. The instruction on fourth degree assault was warranted as an instruction on an inferior degree offense

The right to have a lesser included offense instruction presented to the jury is statutory. *State v. Berlin,* 133 Wn.2d 541, 544-45, 947 P.2d 700 (1997). The pertinent statute provides, "[i]n all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that which he is charged in the indictment or information." RCW 10.61.006. The right to have a lesser included offense instruction presented to the jury is also part and parcel of the right of the accused to have the jury instructed on his theory of the case. *State v. Warden,* 133 Wn.2d 559, 564, 947 P.2d 708 (1997); *Berlin,* 133 Wn.2d at 546, 548.

Either party is entitled to request a lesser included offense instruction. *State v. Tamalini,* 134 Wn.2d 725, 728, 953 P.2d 450 (1998). A two-part test is used to determine when such an instruction is warranted: "First, each of the elements of the lesser offense must be a necessary element of the offense charged [legal prong]. Second, the evidence . . . must support an inference that the lesser crime was committed [factual prong]." *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The analysis under *Workman* "is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute." *Berlin* , 133 Wn.2d at 548; *State v. Lyon,* 96 Wn. App. 447, 450-51, 979 P.2d 926 (1999).

An instruction on an inferior degree offense is properly administered when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an

> inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.
>
> *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

The various assault statutes proscribe but one offense, namely, assault. *State v. Garcia*, 146 Wn. App. 821, 193 P.3d 181, 185 (2008), review denied, 166 Wn.2d 1009, 208 P.3d 1125 (2009). Mr. Harding was charged with second degree assault under RCW 9A.36.021(1)(c). CP 4-5. RCW 9A.36.021(1)(c) provides:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ...
>
> (c) Assaults another with a deadly weapon; . . ..

RCW 9A.36.021(1)(c); Appendix A.

Assault is divided into degrees ranging from the most serious, first-degree assault (a class A felony) to fourth-degree assault (a gross misdemeanor). CP 1-2; RCW 9A.36.011; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041. Fourth-degree assault is a lesser degree of second-degree assault.

> The fourth degree assault statute provides:
> (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
> (2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.041; Appendix A.

The instruction defining assault provided to the jury states:

> An assault is an intentional touching or striking or cutting of another person, with unlawful force, that is harmful or

> offensive regardless of whether any physical injury is done to the person. A touching, striking or cutting is offensive if the touching, striking or cutting would offend an ordinary person who is not unduly sensitive.

CP 77-98 (Instruction 6).

Mr. Harding's request for a fourth degree assault instruction met the "legal" prong of the *Workman* test. The only difference between a fourth degree assault and a second degree assault "as charged and prosecuted," was the additional element of a deadly weapon for the second degree assault. Therefore, every element of the lesser offense, fourth degree assault, is a necessary element of the greater offense, second degree assault. This satisfies the "legal" prong of *Workman* .

The defense request for a fourth degree assault instruction also met the "factual" prong of *Workman*. The factual component is satisfied when the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, instructions should be given when evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense. In determining whether the "factual" prong is met, "some evidence must be presented

which affirmatively establishes the defendant's theory on the lesser included offense." *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993). The evidence must be assessed under the "factual" prong in the light most favorable to the party requesting the instruction. *State v. Cole*, 74 Wn. App. 571, 578-80, 874 P.2d 878, *rev. denied*, 125 Wn.2d 1012 (1994); *State v. Bergeson*, 64 Wn. App. 366, 367, 824 P.2d 515 (1992); *State v. Hanson*, 59 Wn. App. 651, 656 & n.6, 800 P.2d 1124 (1990). In addition, instruction on fourth degree assault is proper when the record supports "an inference that the assault was only committed with a non-deadly weapon." *State v. Winings*, 125 Wn. App. 75, 87, 107 P.3d 141 (2005).

The defense satisfied the "factual" prong because there was affirmative evidence that Mr. Harding only committed a fourth degree assault. Specifically, given the instruction and evidence at trial, the jury could have reasonably concluded that, under the circumstances, Mr. Stark and Mr. Jensen did not sustain substantial bodily harm, or could have concluded that the board was not readily capable of causing death or substantial bodily injury.

Instruction 8, which defined "deadly weapon" for purposes of the second degree assault charge, provides:

> Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 77-98.

Substantial bodily harm means a temporary but substantial disfigurement or impaired function of a body part. RCW 9A.04.110. The statutory definition creates two categories of deadly weapons. *Winings*, 125 Wn. App. at 87. Firearms and explosives are deadly weapons per se. *Id.* Other objects are deadly weapons only if they are capable of causing death or substantial bodily harm under the circumstances in which they are used. *Id.* The circumstances of use include intent, present ability of use, degree of force, part of the body to which it was applied, and the physical injuries inflicted. *Id.* at 88 (citing *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995)).

On the basis of the testimony presented, there is a reasonable probability the jury would have inferred the appellant committed only fourth-degree assault.

Given the virtual absence of medical testimony in this case, the jury could have concluded that Mr. Stark and Mr. Jensen did not suffer substantial bodily injury.

Regarding the "deadly weapon" alternative charged under RCW 9A.36.021(1)(c), the jury could conclude that under the circumstances in which Mr. Harding is alleged to have used the two by four, it was not readily capable of causing death or substantial bodily injury. The jury

could conclude that the board was not a deadly weapon for purposes of second degree assault. Applying the factors from *Shilling*, the board was not used as a deadly weapon. There was no evidence regarding the degree of force Mr. Harding was alleged to have used. Under the circumstances, the jury could therefore conclude that the state failed to meet its burden of proving beyond a reasonable doubt that the board was a deadly weapon.

As discussed above, the facts introduced at trial supported an inference that Mr. Harding only committed fourth degree assault. If the jury did not believe that Mr. Harding acted in self-defense, it could have interpreted the testimony at trial to conclude either that Mr. Harding was merely reckless in wielding the board, or that Mr. Harding lacked intent to inflict substantial bodily harm.

The trial court abused its discretion in failing to instruct the jury on fourth degree assault as an inferior degree offense. It was error for the trial court to refuse to instruct the jury on fourth degree assault as an inferior offense. Fourth degree assault was legally included in the second degree offense charge and the evidence affirmatively supported an inference that only the lesser offense was committed. Therefore, this Court should reverse the conviction for second degree assault. *Warden,* 133 Wn.2d at 564-65.

d. The court's failure to instruct the jury on fourth degree assault was not harmless error

Where there is evidence to support giving a lesser included offense instruction, failure to give it has never been held harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984). It is reversible error for the trial court to refuse to give a proposed instruction if the instruction states the proper law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

As discussed above, the evidence in this case supported the giving of the instruction on the lesser included offense of second degree assault. The trial court abused its discretion in failing to give the fourth degree instructions. This court should vacate Mr. Harding's convictions and remand this case for a new trial.

4. **THE TRIAL COURT ERRED BY GIVING A "FIRST AGGRESSOR" INSTRUCTION**

The trial court erred in instructing the jury on the law surrounding the "first-aggressor" exception to self- defense. A trial court's decision on what instructions to give is reviewed de novo. *State v. Brightman*, 112 Wn.App. 260, 264, 48 P.3d 363 (2002), reversed on other grounds, 155 Wn.2d 506, 122 P.3d 150 (2005).

Jury instruction number 12 reads as follows,

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the

> aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 77-98.

Defense counsel objected to the "aggressor" instruction proposed by the state. 3RP at 10. A defendant whose aggression provokes the contact eliminates his right of self-defense. *State v. Douglas*, 128 Wn.App. 555, 24, 116 P.3d 1012 (2005). A first-aggressor instruction is proper when the record shows that the defendant is involved in wrongful or unlawful conduct before the charged assault occurred. Id. Thus, a first-aggressor instruction appropriate when there is credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense. *Id.*

The Washington Supreme Court has held that first-aggressor instructions should be used sparingly:

> [F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction. While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self- defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

State v. Riley, 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999) (citations omitted). It is error to give such an instruction if it is not supported by credible evidence from which the jury can conclude that it was the defendant who provoked the need to act in self-defense. *State v. Kidd,* 57 Wn.App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990). The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim. *State v. Wasson*, 54 Wn.App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014, 779 P.2d 731 (1989).

The State's argument in support of giving the "first aggressor" instruction was simply that "there's evidence in the front of the jury to find that the Defendant was the aggressor here." 3RP at 11. The court found that the instruction was appropriate. 3RP at 11.

The testimony at trial indicated that Mr. Harding felt threatened by the neighbor's implied threat that he was leaving in order to retrieve a weapon, the radically-tinged argument by Mr. Stark and Mr. Jensen, both of whom appeared to be intoxicated, and that Mr. Harding armed himself with a two by four he found in the stairwell. There was no evidence introduced that Mr. Harding's intent in obtaining the board was for any other reason than to defend himself when the neighbor returned from

downstairs, possibly with a knife or other weapon.

There was insufficient evidence to support giving the jury the first aggressor instruction. The evidence did not support a conclusion that it was Mr. Harding who provoked the need to act in self-defense. The trial court's subjective belief that possession of the board evidences that individual's aggression towards the men is unsupported by the facts before the court and was manifestly unreasonable.

The "first aggressor" instruction prevented Mr. Harding from receiving a fair trial. The last sentence of the first-aggressor instruction prevented the jury's consideration of Mr. Harding's self-defense claim if they found that Mr. Harding's "acts and conduct provoked or commenced the fight." However, as discussed above, the record does not show that Mr. Harding's conduct precipitated the argument with the men so as to warrant giving a first-aggressor instruction.

The aggressor instruction effectively deprived Mr. Harding of his ability to claim self-defense. See *Wasson*, 54 Wn.App. at 160, 772 P.2d 1039 (1989). An error affecting a defendant's self-defense claim is constitutional in nature and cannot be deemed harmless unless it is harmless beyond a reasonable doubt. *Kidd*, 57 Wn.App. at 101 n. 5, 786 P.2d 847, review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990) (citing

State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983)).

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). Since jury instruction number 12 effectively precluded the jury's consideration of Mr. Harding's self-defense claim, the aggressor instruction prevented Mr. Harding from receiving a fair trial. This Court should vacate both convictions and remand for a new trial.

F. CONCLUSION

There was insufficient evidence to convict Mr. Harding of second degree assault since the State failed to meet its burden of proving beyond a reasonable doubt that he did not act in self-defense. Further, the trial court committed reversible error in failing to instruct the jury on second degree assault and in giving the jury the "first aggressor" instruction. This court should vacate Mr. Harding's convictions and remand for new trial.

DATED: August 2, 2016

Respectfully submitted,

THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Daryl Harding

CERTIFICATE OF SERVICE

The undersigned certifies that on August 2, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Mr. Ryan Jurvakainen, Deputy Prosecuting Attorney, Cowlitz County Prosecutor's Office, 312 SW 1st Ave. Rm. 105, Kelso, WA 98626-1799, and appellant, Mr. Daryl Harding DOC# 835627 Washington State Penitentiary 1313 North 13th Avenue, Walla Walla, WA 99362 true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 2, 2016.

PETER B. TILLER

APPENDIX A

RCW 9A.36.041
Assault in the fourth degree.

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.021
Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

TILLER LAW OFFICE

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